

July 15, 2003

## STATUS REPORT

### *Investigation of Ochlockonee River Contamination and Proposed Tired Creek Dam Project*

On March 18, 2003, the Board of County Commissioners authorized the County Attorney's Office to begin investigation of potential sources of contamination in Georgia contributing to water quality problems in the Ochlockonee River and Lakes Iamonia and Talquin. The investigation is directed towards identifying possible means, including litigation, of rectifying cross-border pollution and preserving the quality of Leon County's water. In addition, the Commissioners authorized more active efforts in monitoring the progress of Grady County's proposed dam on Tired Creek, a tributary of the Ochlockonee, to ensure that the project does not adversely impact Leon County's waters.

#### **I. Ochlockonee River Contamination Investigation**

It is a violation of the federal Clean Water Act to discharge pollutants into a river without a permit. If the discharger has a permit, it is illegal to discharge pollutants in excess of the limits established in the permit or to otherwise violate any permit terms or conditions. Leon County can bring a citizen suit to stop certain discharges if the County can prove those discharges are in violation of the Clean Water Act and show that the illegally discharged pollutants are harming waters in Leon County in a manner which gives the County "standing" to assert the claim. (Standing is a legal doctrine that requires a plaintiff to show that the defendants' actions are having some adverse impact upon legally protectable rights of the plaintiff which can be redressed by court action.)

Citizen suits under the Clean Water Act have a number of restrictions on them, however, that limit the ability of a downstream entity to stop all pollution. The most important restrictions are (1) discharges from non-point sources such as farm runoff are not subject to lawsuit; (2) the violating discharges must be current and ongoing, not wholly in the past; (3) discharges that are in compliance with a Georgia-issued permit may not be subject to suit even if those discharges are polluting downstream water bodies; and (4) no suit is allowed if either the state of Georgia or the federal EPA is "diligently prosecuting" an action against the polluter.

The Ochlockonee investigation is being conducted by the County's water quality consultant, Dr. Sean McGlynn, and the Washington, D.C. law firm of Crowell & Moring. The initial focus of the investigation has been the collection and review of records regarding roughly 30 permitted dischargers in a five-county area that were sought under the Georgia Freedom of Information Act from the Georgia Department of Environmental Protection in Atlanta. The review of those records is intended to identify the largest contributors to Leon County's water deterioration and potential violators of the Clean Water Act who may be subject to a citizen suit

under the above requirements. The investigators are currently reviewing several boxes of permits, discharge monitoring reports, and correspondence with Georgia EPD.

In addition, the investigators are reviewing all sources of water quality data, including measurements taken by Dr. McGlynn over the last three years, to identify the impact on Leon County's waters from illegal Georgia discharges. Additional monitoring and study during the summer is likely.

From current efforts, we have learned that there appear to be a number of permitted facilities, some private and some associated with municipal sewage treatment systems, that are potentially in violation of their permits or discharging without a permit. It is not yet clear how serious the violations are or the extent to which those violations are contributing to water problems in Leon County. We are continuing this review. Much of the pollution loading crossing the border, however, appears to be the result of nutrients and other materials that Georgia has agreed to allow facilities to discharge under their permits. If so, the remedy as to those sources will likely not lie in a citizen suit but in efforts with the federal EPA to require Georgia to impose more restrictive permit limitations that will protect Florida's receiving water bodies.

If the investigation and further study will support a lawsuit, the County Attorney's Office would expect to prepare a recommendation for the County Commissioners to begin legal proceedings probably in the early fall. The initial step in those proceedings would be to provide the required sixty-day notice to the defendants, Georgia EPD, and the EPA, after which a lawsuit could be filed.

## **II. Tired Creek Dam Project**

The investigation into the status of the Tired Creek Dam project indicates that Grady County had not pursued the requisite Corps of Engineers Section 404 permit as of May 2003. From the records obtained through a Freedom of Information Act request to the U.S. Corps of Engineers office in Savannah, it appears that Grady County provided a preliminary wetlands assessment to the Corps in 1995, but there are no other records in the Corps' file regarding the project. We presume that the county has been awaiting funding from the state. Based on Governor Perdue's recent statements, \$500,000 may soon be provided to the county to fund the permitting process. If this money is forthcoming, we expect the county to begin the permitting process with Corps.

The Corps is required to consider the downstream effects of the dam, including possible effects in Florida, before issuing a permit. In addition, the Corps will likely have to comply with the requirements of the federal National Environmental Protection Act, under which the Corps must undertake an environmental assessment of the impacts of the proposed dam. If the County wishes, it may participate in both the Clean Water Act and NEPA reviews, and may meet the requirements to formally intervene, with rights of appeal, in the Clean Water Act permit review in an effort to oppose the dam on the basis of adverse downstream impacts. The County would likely have to present expert analysis and evidence of likely downstream impacts, which would require the retention of an engineering firm to conduct this analysis. The County will likely also

need the assistance of the Florida DEP, as the state of Florida will have certain rights during the permitting process that are not available to Leon County.

The County Attorney's Office will continue to monitor this situation to determine if and when Grady County files for the Section 404 permit. If the state of Georgia provides the \$500,000 promised by Governor Perdue, the Board may wish at that point to retain its own engineering firm to study the downstream impacts and prepare a report for the Corps and Florida DEP.